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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/735,231	12/12/2003	Deborah Daley	GLM-1052	1854

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EXAMINER	
WEINSTEIN, STEVEN L	

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 07/16/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/735,231	DALEY ET AL.	
	Examiner	Art Unit	
	Steven L. Weinstein	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) 1-61 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) 1-61 is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date 12/12/03
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 34, 35, 61, 2, 36, 4-7, 11-18, 38-41, 45-52 and 24-28 are rejected under 35 U.S.C. 102(b) as being anticipated by Handelman et al.

In regard to claim 1, Handelman et al discloses a method of making an edible straw comprising mixing dry ingredients with a wet ingredient (e.g.-water) to create a dough, shaping the dough as a cylinder with a cavity formed therein and baking the dough to create a straw for drinking liquids. Similarly, in regard to claims 34 and 61, Handelman et al discloses an edible straw for drinking liquids comprising a baked mixture of dry and wet ingredients wherein the baked mixture has a longitudinal extent and an approximately cylindrical shape with a cavity formed therein for passing liquids therethough. In regard to claim 61, which recites that the baked mixture substantially, retains its shape in a liquid for at least 30 minutes, see e.g. in this regard page 14, para. 2 which discloses an hour or longer. In regard to claim 2, Handelman et al discloses at least one ingredient from the list of dry ingredients. Handelman et al discloses flour. This is all Handelman et al needs to disclose to anticipate claim 2 since claim 2recites the ingredients in the alternative. Note, however, Handelman et al also discloses fiber, sugar and flavoring. It is noted that claims 4-7 and 13-18 further recite specifics of the other alternative ingredients of claim 3. Since these ingredients have been recited in the alternative, and since Handelman et al anticipates claim 3 since it teaches one of the alternative ingredients, claims 4-7 and 13-18 are still anticipated by Handelman et al. For example, claim 4, which is dependent on

claim 2, is readable on dry ingredients selected form one of the group consisting of flour, fiber, ... Wherein the fiber is selected from at least one of the group consisting of guar gum, acacia, etc. Although claims 4-7 and 13-18 are rejected under 35 USC 102 as further defining alternative ingredients, it is noted that all of the catagories of ingredients, as well as the specific examples, are notoriously well known food ingredients and their use is well established in the food art including flour based products. Applicants are requested to submit any patents and publications they are aware of relative to these conventional ingredients. Similarly, the particular concentrations of these ingredients, if not already conventional, would have been an obvious result effective variable.

See in this regard In re Levin, 84 USPQ 232 wherein the Court stated on page 234 as follows:

This Court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function. In re Benjamin D. White, 17 C.C.P.A (Patents) 956, 39 F. 2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221.

In regard to claim 11 and 12, Handelman et al discloses the straw composition contains 40% flour plus or minus 10%. In regard to claims 24-28, Handelman et al discloses extruding the dough into a cylindrical shape, the use of a die, and creating the cavity by insertion of a die.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 3, 37, 21, 55, 22, 23, 29-32 and 57-60 are rejected under 35 U.S.C. 103(a) as being unpatentable over Handelman et al.

Claim 3 recites various flours in the alternative. Handelman et al is silent as to the particular flour. Claim 3 recites whole-wheat flour. Whole wheat flour is, of course, notoriously conventional in the art. Among other attributes, it is considered to be healthier than refined flour and baked goods made from whole wheat flour are denser. To modify Handelman et al and employ a conventional flour for its art recognized and applicants intended function is therefore seen to have been obvious. In regard to claim 21, it is well established to add vitamins, minerals and proteins to food including baked foods. In regard to claims 22 and 23, since Handelman et al teaches baking the straw, the particular time and temperature is seen to have been an obvious result effective variable. In regard to claim 23, baking inherently evaporates moisture from a dough. This is how a dough browns and forms a crust. In regard to claims 29-32, which recite dimensions, the particular dimensions, if not inherent in Handelman et al, is seen to have been an obvious matter of choice and/or design.

Hendelman et al appears to only disclose the thickness of the walls. However, like applicants, Handelman et al makes a molded baked straw.

Claims 8, 9, 10, 19, 20, 42, 43, 44, 53 and 54 are rejected under 35 U.S.C. 103(a) as being unpatentable over Handelman et al in view of Sellback (5,223,286).

In regard to claim 8, Handelman et al employs egg powder and employs water to form the dough. Claim 8 differs from Handelman et al in that the egg is present in liquid form. Sellback teaches it is well established to provide liquid egg in a baked product. Whether one employs whole egg or egg white is seen to have been an obvious result effective variable. For example, it is well established that one can employ egg white if one is concerned about fat. The particular amount of egg employed is seen to have been an obvious result effective variable. Claims 9 and 10 are further details of other alternative wet ingredients and as such would not have to be shown by the art. In any case, as discussed above, the particular conventional ingredients one chooses is seen to have been an obvious matter of choice. Molasses as a sugar substitute is well established as are flavor extracts.

Claims 33 and 56 are rejected under 35 U.S.C. 103(a) as being unpatentable over Handelman et al in view of Herting (4,859,479).

Claim 33 recites that the edible straw is "decorated". As evidenced by Herting, it is well established to decorate a baked dough object with indicia, logos or pictorials (col. 4, line 3 plus), and to modify Handelman et al and decorate the product for its art recognized and applicants intended function would therefore have been obvious.

The remainder of the references cited on the USPTO 892 form are cited as pertinent art. For example, Grant also discloses a flour based straw, whereas Trojahn discharges a flour, sugar,

margarine, baking powder, egg and flavoring baked composition; Thorner et al, flour, egg white and sugar and natural fibers; Washburn, flour, brown sugar, protein, flavoring and soda; Savage, flour, eggs, brown sugar, etc; Negro, flour, egg, etc, and Dugas, brown sugar, whole and white flour, flavoring, etc.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven Weinstein whose telephone number is (571) 272-1410. The examiner can normally be reached on Monday thru Friday from 6:00 AM to 5:30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Weinstein/LR
June 15, 2004

STEVE WEINSTEIN
PRIMARY EXAMINER 1761
9/13/04